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No. 92-1775

IN THE

Supreme Court of the United States

October Term, 1992

RAWL SALES AND PROCESSING COMPANY,

Petitioner,

v.

TRUSTEES, UNITED MINE WORKERS OF AMERICA 1950 PENSION TRUST, *et al.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY OF PETITIONER RAWL SALES AND PROCESSING COMPANY

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[1/] Pursuant to Rule 29.1 of the Rules of the United States Supreme Court, Rawl states that the disclosure contained at page ii of its Petition for Certiorari does not require amendment.

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REPLY OF PETITIONER RAWL SALES AND PROCESSING COMPANY

1. The Issues Were Raised Below

In a startling mischaracterization of the proceedings below, the Trustees claim that the waiver issues set forth in Rawl's Petition were not raised to the court of appeals. In its Statement of Issues to the appellate court, Rawl posed the following question:

> 4. Whether the district court erred in its conclusion that enforcement of the labor contracts, as interpreted by Plaintiffs, does not *violate federal labor law and policy?*

Joint Br. of Appellants at 2.[1/]

Rawl went on to "seek judgment on [its] strictly legal defense of . . . violation of federal labor policy," *id.* at 5, explaining that "[t]hese [federal policies] protect the rights of employers to withdraw from multi-employer collective bargaining units and the right of employers to independently negotiate and sign labor agreements governing the terms of employment, including health and pension benefits." *Id.* at 27-28.

At every stage of this litigation Rawl argued that its statutory right to bargain has been waived, and that the right had been taken, in perpetuity, by BCOA. *See* Rawl's Reply Mem. in Support of Summ. J., JA 185-188, Joint Br. of Appellants at 2, 47-50. Throughout the litigation Rawl argued that as a result of the waiver of bargaining rights, it has been prevented from effectively withdrawing from the multi-employer group. This is the underpinning of all of its arguments to this Court. There can be no real dispute that Rawl adequately raised the issue of perpetual waiver of bargaining rights below.

It is likewise perplexing for Respondents to intimate surprise at Rawl's contention that the waiver issue conflicts with federal labor policy since Rawl raised it below as one of the four principle issues in the case. Moreover, in the

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[1/] Indeed, Rawl and Pittston urged the Court of Appeals to grant leave to appeal on the grounds that the case presented questions of "federal labor law and policy" involving an "employer's right to withdraw from multi-employer bargaining," . . ."waiv[er] [of] the statutorily protected right . . . to bargain" and because the district court's decision had "ramifications for all current and future collective bargaining agreements and the parties who negotiate them. . . ." Pittston's Pet. for Leave to Appeal at 17-18.

court of appeals the Trustees, citing *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), fully briefed the issue that the companies were being coerced in the selection of their bargaining representative. Br. of Appellees at 58-60. Thus, to suggest that these issues were not presented to the court of appeals misstates the facts.

All of the arguments Rawl urges this Court to hear are closely related to the central issue of waiver. The important fact is that each of these arguments was before the court of appeals and that the court and the Trustees had ample opportunity to address each of them. The issues presented are not foreign to this litigation, nor do they present new causes of action or novel arguments.[2/]

In its rush to decide this case, the court of appeals ignored the important effect that its decision would have on the collective bargaining relationship of Rawl and hundreds of other coal companies, as well as the effect on all companies engaged in multi-employer bargaining. The fact that the court refused to address these issues does not undermine Rawl's Petition. Because the court of appeals was of the opinion that a waiver argument is "specious", App. 17, it is not surprising that the court did not address the effect of such a waiver. In the view of the court of appeals, it would be superfluous to consider the effect of something that was not present in the case. Rawl's Petition

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[2/] Each of the cases cited by the Trustees involved an entirely new issue that had been raised in this Court. For example, in *Delta Airlines, Inc. v. August*, 450 U.S. 346 (1980), the entire issue presented to the Court of Appeals involved Fed. R. Civ. P. 68. On certiorari, the Petitioner attempted to raise the issue of whether the district court abused its discretion by denying costs under Rule 54(d). Predictably, this Court refused to exercise its jurisdiction to reach that question.

asks this Court to recognize that an important waiver of rights is present and, unlike the court of appeals, focus on the issues presented by that waiver.

2. This Is a Waiver Case

Respondents never confronted the crux of why this is a waiver case. They acknowledge that, in other waiver cases, the parameters of the post contractual commitment are either fixed or tied to an objective standard. Opp'n. p. 9.[3/] In this case, whether benefits will be provided at all, the level of those benefits and what they will cost are entirely dependent on periodic collective bargaining in which Rawl may not participate. In the years to come, pension benefits may be increased or decreased and other benefits such as life insurance may be added or subtracted from the benefits provided by the Funds. The negotiated cost of these benefits may skyrocket or BCOA and the union may place the payment burden disproportionately on non BCOA members. Rawl has no say in any of it and yet Rawl and its employees are bound by all of it. Thus, benefits and their costs are not, as the Trustees say, "specified." Opp'n. p. 9-10, n. 13.[4/]

It cannot be said here that Rawl "has exercised" its right to bargain as a result of a contractual commitment which extends beyond the contract's term. Bargaining

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[3/] Respondent's Brief in Opposition is cited as "Opp. p. ___."

[4/] Attempting to make less of the case, Respondents omit any reference to the fact that BCOA will negotiate for Rawl the level and nature of benefits to be provided Rawl's employees, not just the cost of those benefits to Rawl. Moreover, the Coal Industry Retiree Health Act of 1992, discussed at length by Respondents, does not pertain to pension or life insurance benefits.

continues -- bargaining which affects essential terms and conditions of employment. Contrary to Respondent's argument, it is self-evident that the contract at issue here has not "fully defined the parties' rights as to what would normally be a mandatory subject of bargaining." *See Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992). Nor did the agreement "fix[] the parties' rights and foreclose[] further mandatory bargaining." *See Local Union No. 47, IBEW v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991). Rather, those rights will be defined through future, mandatory collective bargaining.[5/]

One of the Trustees' arguments especially proves Rawl's point. In 1991 the BCOA and the union decided that the Funds would provide death benefits to retirees of BCOA members signatory to the 1988 Wage Agreement --benefits which individual employers previously were contractually obligated to provide. Pet. p. 14; Opp'n. p. 9, n. 12. This change constituted a financial advantage to BCOA members. The Trustees argue that BCOA has gained no advantage over its competitors because any contributing employer -- not just any BCOA member -- *which accepted the reopener settlement negotiated by BCOA and the UMWA* could shift liability for death benefits to the Funds. *Id.* In other words in order to receive the benefit, the non BCOA employer

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[5/] The cases cited by the Trustees at note 13 of their brief are inapposite. In each of those cases the employer merely promised to provide benefits beyond the term of the collective bargaining agreement. The employer and the union would decide together what these benefits would be and how to allocate the costs. There was no issue in any of those cases as to whether the employers had given away the right to bargain with the union over what the benefits would be or how they would be funded and paid out. Here, it is the central issue -- Rawl has no such right.

must accept BCOA's settlement, one which it did not negotiate.

If Rawl has permanently delegated its bargaining right to BCOA, Respondent's argument further demonstrates why the collective bargaining process fashioned by the court of appeals will not work. Knowing that the Funds are now obligated to provide life insurance benefits, Rawl and the union would not negotiate a contract requiring Rawl to provide such benefits directly. However, in their next negotiation, BCOA and the union may reverse their 1991 decision, requiring individual employers to resume providing such benefits. This would leave Rawl's retirees with no life insurance benefits -- Rawl would not be signatory to a contract or participant in any Funds which provide such benefits. The reverse could also be true -- Rawl may be obligated to provide life insurance directly to its pensioners and pay for the Funds to do so as well.[5] Again, the collective bargaining process resulting from the lower court's decision simply will not work.

The Trustees' attempt to distinguish *NLRB v. General Tire & Rubber Co.*, 795 F.2d 585 (6th Cir. 1986), falls flat. At issue in *General Tire* and in this case was whether a party had contracted away -- waived -- bargaining rights. In order to determine whether the union in *General Tire* contracted away its bargaining rights, the Sixth Circuit applied the clear and unmistakable waiver test. *Id.* at 588. As demonstrated above, the crux of Rawl's position is that its future bargaining rights have been declared forfeited, not clearly and unmistakably, but rather by simple contract interpretation.

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[5] Because Rawl is already funding the pension plan it negotiated with the union, Rawl may well have to fund, retroactively and prospectively, two pension plans if the decision below stands.

Finally, the Trustees' and BCOA's suggestion that the waiver is not perpetual is misleading. The waiver -- a delegation of bargaining authority -- lasts so long as BCOA wants it to. It is a perpetual power of attorney only terminable by the attorney. It is a convoluted agency where the agent directs the principal. It is the type of precedent which, if allowed to continue, could severely undermine multi-employer bargaining. *See* Pittston's Pet. at 18-19.

3. Amax Coal Does Not Support the Trustees' Arguments

The Trustees suggest that the question of an employer's right to withdraw from multi-employer bargaining is settled by this Court's decision in *Amax*, 453 U.S. 322. Frankly, to the extent *Amax* addressed the issues in this case, it supports Rawl's position.

In *Amax*, "[t]he question at issue [was] whether the employer selected trustees of a trust fund . . . are 'representatives' of the employer 'for purposes of collective bargaining'. . . ." 453 U.S. at 325. This Court held that, since such trustees do not engage in collective bargaining activities, Amax's selection of its bargaining representative had not been unlawfully coerced by the union's strike to force the company to participate in the funds. *Id.* at 335-336. However, the Court implied that its decision would have been different if the management trustees were to "bargain with [union trustees] to set the terms of the employer-employee contract." *Id.* at 336.[2/] In this case,

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[2/] There was no suggestion in *Amax* that anyone other than Amax and the union would negotiate over and set the terms of Amax's participation in the Funds. Nor was there any question that Amax could lawfully withdraw from the Funds.

the designation of Rawl's collective bargaining agent *is* the issue. Here, BCOA is indeed setting the "terms of [Rawl's] employer-employee contract" concerning pension and other benefits. [8/] BCOA is now, once again, Rawl's collective bargaining representative, and as a result of the court of appeals opinion, there is absolutely nothing Rawl can do about it.[9/] Congress' fear that "the identity of those who would represent employers in collective bargaining" would be "dictate[d]" has been fully realized by this case. *Id.* at 335.

4. BCOA's Attempt to Confuse

BCOA paints a picture of a straight-forward contractual obligation from which Rawl walked away. BCOA could not be more wrong on both counts. First, there is nothing straight-forward about an obligation the Trustees manufactured 10 years after the fact. Even the Trustees admit that they did not think up the evergreen theory until 1988 — ten years after it was allegedly negotiated. Br. of Appellees at 42-47. During the ten years from 1978 to 1988 everyone in the coal industry -- the UMWA, the BCOA, the Trustees, Rawl and others -- acted

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[8/] The Trustees declare that "it necessarily follows that the contract binding petitioner to continue to participate in a multi-employer trust is not equivalent to a perpetual designation of BCOA as its agent for multiemployer bargaining or a waiver of petitioner's right to bargain separately." Opp'n at 13. To the contrary, as demonstrated above, that is exactly what it is.

[9/] The 1988 Wage Agreement expired in February and BCOA and the union are attempting to agree on a successor agreement. If the decision of the court of appeals stands, BCOA and the UMWA are, therefore, negotiating right now over the future contributions to be made by Rawl and the future benefits to be given Rawl's employees and retirees.

as if there was no continuing commitment to the Trusts. The Trustees repeatedly went to court and proved that fact without objection from BCOA or the union. *See* Pittston Pet. at 7. Rawl withdrew from BCOA, and BCOA said nothing. Rawl withdrew from the Funds, and the UMWA never said Rawl had a continuing contractual commitment to stay in. Instead, the union signed a contract letting Rawl out. JA 986-995. In the Third Circuit, such conduct would have warranted summary judgment for Rawl. *Teamsters Indus. Employees Welfare Fund v. Rolls Royce Motor Cars, Inc.*, 989 F.2d 132 (3rd Cir. 1993).

BCOA's suggestion that Rawl ratified the evergreen commitment is a bold fabrication. No one ever ratified the evergreen commitment, because nobody ever knew about it. BCOA told no one.[10] Until BCOA's *amicus* brief in this Court, no party to this litigation ever disputed this fact. BCOA's ratification assertion is even more perplexing since, in the same year BCOA alleges Rawl ratified the evergreen commitment, the Trustees: a) were publishing to the industry a withdrawal liability bulletin stating that employers who, like Rawl, became non-signatory to a Wage Agreement no longer had an obligation to contribute to the Funds, *see* JA 1069-1072; and b) were for the first of many times, pursuing an employer similarly situated to Rawl for withdrawal

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[10] BCOA's suggestion that Rawl never said that it was not aware of the so-called evergreen commitment is preposterous. BCOA *amicus* Br. at 19. In the *very document* BCOA cites to state that Morgan Massey was a BCOA board member (he was, in fact, the representative of the *small* coal operators in 1981, not 1978) Mr. Massey states that he was never provided with a copy of the Trust documents and was never aware of an agreement which prohibited withdrawal from the funds. JA 839-840. The truth is that BCOA, throughout years of litigation and even in its *amicus* brief to this Court, has *never* said that it told anyone about this momentous commitment, including Rawl.

liability.[11/] *See* JA 1008. BCOA's effort to cloud rather than amplify the facts serves no useful purpose.

Conclusion

For the reasons stated in its Petition and herein, Rawl respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully Submitted,

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[11/] Indeed, in light of Rawl's knowledge that the Trustees had pursued numerous employers for withdrawal liability, Rawl expected and was fully prepared to pay its fair share of withdrawal liability when it withdrew from the Funds.